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P.L.#1

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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-186779

DATE: November 15, 1976

MATTER OF: Price Waterhouse & Co.

DIGEST:

1. Protest that 5-day proposal response period favored contractor who was familiar with subject of procurement and prevented others from presenting acceptable proposals held moot following extension of closing date. In any case, date for receipt of proposals is determination for contracting agency, and GAO will intervene only if agency's decision is arbitrary or capricious. Government is not required to equalize competition by considering advantage enjoyed by certain firms due to incumbency or particular circumstances; test is whether advantage is result of preference or unfair action by Government.
2. Experience requirements for nursing home audit held reasonable and not unduly restrictive of competition where HEW seeks accounting firm with ability to detect Medicaid fraud and to evaluate review procedures as well as to determine accuracy of financial reports. Fact that one offeror cannot or will not meet Government's needs does not warrant conclusion that specifications are unduly restrictive, especially where more than one acceptable proposal was received.

On June 18, 1976, request for proposals (RFP) No. SRS 76-22 was issued by the Social and Rehabilitation Service, Department of Health, Education, and Welfare (HEW), seeking an accounting firm to review 50 Massachusetts nursing homes in connection with an investigation of suspected fraud and abuse in Medicaid programs. The program was considered so urgent that proposals were solicited only for 5 days, the minimum time estimated to be necessary for their preparation. The closing date for receipt of proposals was June 23, 1976.

A protest alleging an unfair denial of its right to present a timely proposal was filed by Price Waterhouse & Co. (Price Waterhouse) on June 21, 1976. Price Waterhouse first contends that the short solicitation period (which included only 3 business days since June 18, 1976, fell on a Friday) made it impossible for a contractor who was not familiar with the program to prepare a meaningful proposal. It

B-186779

also allegedly gave an unfair advantage to Touche Ross and Co. (Touche Ross), the accounting firm which, under separate contract, had prepared the review guide to be used for nursing homes. Price Waterhouse's second contention is that the experience requirements of the RFP unduly restricted competition by eliminating a large number of accounting firms which, by State and professional standards, "are considered qualified to perform the audit work requested."

The solicitation in question was initiated as part of an intensive effort by HEW to review nursing homes, physicians, pharmacies and laboratories. HEW's Medical Services Administration (MSA) developed Federal-State review guides designed to document the extent and type of fraud in existing programs and to identify providers possibly subject to criminal prosecution. Massachusetts and Ohio were targeted for the first reviews.

After determining that the necessary expertise could not be developed among its staff members in time for all reviews to be conducted simultaneously, MSA elected to contract out the nursing home review. Offerors were required to detail the academic, professional, and technical qualifications of all key staff members who would be assigned to the project. Desirable qualifications were listed in the RFP as follows:

"PARTNERS:

"At least 3 or more partners in the firm with 5 or more years each as a partner. The partner to be assigned to this contract must have at least 3 years of partner experience in the nursing home area.

"PROJECT DIRECTOR AND DEPUTY PROJECT DIRECTOR:

"At least 5 years of experience as a Senior Audit Manager of teams consisting of 5 auditors. 3 years of this experience in auditing nursing homes, and a CPA certificate attained at least 8 years ago.

"TEAM LEADER:

A CPA certificate attained at least 3 years ago with experience in at least one previous nursing home audit.

"TEAM MEMBERS:

"Junior Auditors with degrees in Accounting,

B-186779

Economics or Financial Management or the equivalent plus at least one year's audit experience with the firm."

In addition, each offeror was required to certify:

- "1. That the Partner to be assigned to this contract has 3 years of partner experience in the nursing home area.
- "2. That the Project Director and Deputy Project Director to be assigned to this contract are CPA's, have 5 years experience as Senior Audit Managers of teams consisting of 5 auditors, and have 3 years of this experience in auditing nursing homes.
- "3. That the Team Leader to be assigned to this contract is a CPA and has experience in one previous nursing home audit."

Any offeror failing to provide such certification would be considered nonresponsive, the RFP stated, and offerors would not be permitted to replace key staff members without prior written approval.

By the June 23, 1976, closing date, only the proposal of Touche Ross had been received by HEW and, following evaluation, it was found technically unacceptable. Consequently, the solicitation was modified as to the scope of work and the closing date was extended. Amendment No. 001, dated July 8, 1976, called for review of 15 nursing homes in Massachusetts and 35 in Ohio. Staff qualifications, however, remained unchanged. Two acceptable proposals were received by the new closing date, July 26, and the contract was awarded to Wolfe and Company on September 1, 1976.

The threshold issue is whether the protester's first ground of complaint, the 5-day response period, has been rendered moot by the subsequent extension of the closing date for receipt of proposals. We agree with HEW that it has. Any ruling on the 5-day response period would have no practical legal effect upon the existing controversy, since that response period was extended by the amended RFP.

The protester disagrees, stating that it could not accept the modification as a remedy or consider responding to the amended RFP

until all factors involved in its protest had been resolved. Even if this portion of the protest were not considered moot, determination of the date for receipt of proposals is a matter of judgment properly vested in the contracting agency, and our Office will not substitute its judgment unless it appears that the agency's decision was arbitrary or capricious. 50 Comp. Gen. 565, 571 (1971); National Small Business Association, B-184052, September 26, 1975, 75-2 CPD 196; Donaldson Company, Inc., B-183657, September 15, 1975, 75-2 CPD 148.

The Federal Procurement Regulations (FPR), Part 1-3, governing procurement by negotiation, are silent as to the time which should be available for preparation of proposals. Section 1-2.202-1(c) (1964 ed. amend. 139), covering formal advertised procurements, establishes the general rule that bidding time shall not be less than 30 days when other than standard commercial articles or services are procured; however, the rule "need not be observed in special circumstances or where urgency of the need for supplies or services does not permit such delay." National Small Business Association, *supra*; see also Dyneteria, Inc., B-181589, October 29, 1974, 74-2 CPD 230.

Commenting on a 2-day period for submission of proposals, our Office has observed that FPR § 1-3.101(d) requires negotiation to be conducted on a competitive basis to the maximum practical extent, but that whether a particular procurement unduly restricts competition depends upon the facts and circumstances in question. Singer Business Machines, B-180279, July 3, 1974, 74-2 CPD 4.

In the instant case, the Commissioner, MSA, had described the need to complete the nursing home review in Massachusetts as "immediate and critical," and had stated that the fraud and abuse effort would suffer "irreparable harm" if the contract award were postponed beyond July 8, 1976. HEW's choice of a 5-day response period also is supported by the record as to the extent of Medicaid fraud and abuse, estimated at \$1.2 billion annually. Other considerations included projected further losses in the delivery of health care to indigents if the review were not begun immediately, the hoped-for deterrent effect of such reviews, the time constraints involving the three other reviews already under way in Massachusetts, and the need to demonstrate HEW's ability to respond to public and congressional criticism (even though the department acknowledges that much of the urgency was due to its own neglect during the Medicaid program's first 10 years).

As for Price Waterhouse's contention that evaluation and award should have been delayed until resolution of its protest, we held in the case of a protest filed 3 days before the date for receipt of

B-186779

proposals that an agency is not required to postpone evaluation of offers prior to the resolution of the protest. Hew Es Co., Incorporated, B-183040, April 18, 1975, 75-1 CPD 239. Moreover, our Office is without authority to require the withholding of an award until its decision on a bid protest is announced, 51 Comp. Gen. 787, 792 (1972), Potomac Research Incorporated, B-182823, April 29, 1975, 75-1 CPD 265. Such is the case even when the procuring agency has not issued an administrative report within the 25-day period set forth in our bid protest procedures. Aerospace Engineering Services Corporation, B-184850, March 9, 1976, 76-1 CPD 164.

The Federal Procurement Regulations set out procedures for award of a contract during pendency of a written protest, requiring that the contracting officer determine that performance will be unduly delayed by failure to make an award promptly. FPR § 1-2.407-8(3) and (4) (1964 ed. amend. 68). Award of a contract while a protest is pending is not improper, so long as it is determined that prompt award will be advantageous to the Government and GAO is notified by the agency of its intent to make the award. RAI Research Corporation, B-184315, February 13, 1976, 76-1 CPD 99; ILC Dover, B-182104, November 29, 1974, 74-2 CPD 301.

The protester's allegation that the short response period gave an unfair advantage to Touche Ross, the firm which had prepared the nursing home review guide, is clearly rebutted by the fact that its initial proposal was unacceptable and the final award was not made to that firm. We have long recognized that:

"* * * certain firms may enjoy a competitive advantage by virtue of their incumbency or their own particular circumstances * * * We know of no requirement for equalizing competition by taking into consideration these types of advantages, nor do we know of any possible way in which such equalization could be effected. * * * Rather, the test to be applied is whether the competitive advantage enjoyed by a particular firm would be the result of a preference or unfair action by the Government."

ENSEC Service Corp., B-184803, B-184804, B-184805, January 19, 1976, 76-1 CPD 34 and cases cited therein; Field Maintenance Services Corporation, B-185339, May 28, 1976, 76-1 CPD 350.

On the second issue, of whether the necessary and desirable experience requirements of the RFP were unduly restrictive in light of

B-186779

the scope of work to be performed, we find, for the reasons that follow, that portion of the protest also is without merit.

In Kleen-Rite Corporation, B-183505, July 7, 1975, 75-2 CPD 18, we upheld Air Force experience and education requirements for supervisors and managers of air base dining halls against charges that they were unduly restrictive and overstated the Government's needs. We stated:

"* * * Any specification imposed in a contract, by its very nature, will restrict competition to some extent. In this regard, our Office has consistently stated that specifications should be drawn to maximize competition. However, we will not interpose our judgment for that of the agency's even where competition is reduced unless there is clear and convincing evidence that the agency opinion is in error and that contract awarded on that basis will be unduly restrictive of competition. Winslow Associates, 53 Comp. Gen. 478, 481 (1974) * * *."

In Johnson Controls, Inc., B-184416, January 2, 1976, 76-1 CPD 4, we further stated that:

"* * * The responsibility for drafting proper specifications reflecting the needs of the Government is primarily that of the contracting agency. The procurement statutes * * * require that the specifications be drawn so as to permit the greatest amount of competition consistent with the needs of the Government. However, it is well established that the Government does not violate either the letter or spirit of competitive bidding statutes merely because only one firm can supply its needs, provided the specifications are reasonable and necessary for the purpose intended. 45 Comp. Gen. 365, 368 (1965); B-178288, May 24, 1973; B-172903, July 6, 1971; B-159550, February 13, 1967."

A review of the qualifications listed in the instant RFP does not convince us that they are unduly restrictive or in excess of the agency's actual needs. The explanation of the basis for those requirements, contained in a July 2 memorandum prepared by MSA's Division of Fraud and Abuse Control, includes the following: that auditors with nursing home experience exist in large numbers; that to some extent fraud and abuse has grown to its present magnitude because past audits have

B-186779

been more concerned with accuracy than with detection of major program frauds; that increased complexity of audits is anticipated due to cost-related reimbursement systems which were required beginning July 1, 1976; and that the auditors have the additional task of evaluating and refining the nursing home review guides on the basis of their experiences in the states contracted for. The criteria were developed by a project officer who is himself a certified public accountant. The memorandum further states:

"The audit staff must already be thoroughly experienced and comfortable with nursing home accounting and with nursing home reimbursement methods so that they can devote their full attention to critically identifying questionable areas. * * * We are asking auditors to do something that has not been done before and we feel that the Government is best served by purchasing the services of thoroughly experienced audit staff * * *."

The level of experience sought was available in the marketplace, HEW states; of 14 firms originally solicited, 9 indicated their acceptance of the staff qualifications. The lack of response to the original RFP, the agency concludes, was due mainly to the inability of accounting firms to commit such experienced staff members to the nursing home project within the time required.

Viewed as a whole, this explanation of the basis for the experience requirements appears reasonable and not arbitrary or capricious. The conclusion that the requirements were not unduly restrictive also is supported by the fact that HEW received more than one acceptable response to the amended RFP. The fact that one offeror cannot or will not meet the Government's needs does not warrant the conclusion that the specifications were unduly restrictive. Kleen-Rite Corporation, supra, citing 36 Comp. Gen. 251 (1956), 33 id. 586 (1954), and 30 id. 363 (1951).

Accordingly, the protest is denied.

P. F. K. 114
Acting Comptroller General
of the United States